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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-692

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

DONALD SOMERVILLE,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT**

DOCKET ENTRIES

**In The District Court For The Northern District
Of Illinois, Eastern Division:**

March 21, 1969

Petition for a writ of habeas corpus filed.

March 27, 1969

Notice of filing petition for a writ of habeas corpus by
Donald Somerville.

April 4, 1969

Order directing the State of Illinois to file an answer to petition for a writ of habeas corpus on or before April 14, 1969.

April 11, 1969

Return to rule to show cause why a petition for a writ of habeas corpus should not be granted filed by respondent, the State of Illinois.

April 16, 1969

Order and memorandum opinion denying petition for a writ of habeas corpus.

April 17, 1969

Petition by Donald Somerville for leave to file a reply and brief in response to return to rule to show cause.

Order granting Donald Somerville 10 days to which to file reply and brief. Order continuing generally the motion of Donald Someville to vacate order dismissing petition for a writ of habeas corpus.

April 28, 1969

Brief in support of petition for a writ of habeas corpus filed by Donald Somerville.

April 30, 1969

Order denying motion to vacate order dismissing petition for a writ of habeas corpus.

May 9, 1969

Notice of appeal filed by Donald Somerville.

In The United States Court of Appeals
For The Seventh Circuit:

July 30, 1969

Record on appeal filed.

April 15, 1970

Oral arguments heard.

May 14, 1970

Opinion and judgment affirming order dismissing petition for writ of habeas corpus.

May 28, 1970

Petition for rehearing *en banc* filed by Donald Somerville.

August 19, 1970

Order entered denying petition for rehearing.

In The Supreme Court Of The United States:

November 16, 1970

Petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed.

April 5, 1971

Petition for a writ of certiorari granted, judgment of the United States Court of Appeals for the Seventh Circuit vacated, and case remanded for reconsideration in light of *United States v. Jorn*, 401 U. S. 470 (1971), and *Downum v. United States*, 372 U. S. 735 (1963).

4

**In The United States Court Of Appeals For The
Seventh Circuit:**

April 7, 1971

**Filed Supreme Court order vacating judgment of May
14, 1970.**

May 19, 1971

**Order entered that each party file supplementary briefs
addressed to the application, if any, of United States v.
Jorn to the instant appeal.**

July 20, 1971

**Opinion and judgment reversing order dismissing peti-
tion for writ of habeas corpus.**

August 3, 1971

**Petition for rehearing en banc filed by the State of
Illinois.**

September 3, 1971

Petition for rehearing denied.

In The Supreme Court Of The United States:

November 24, 1971

**Petition for a writ of certiorari to the United States
Court of Appeals for the Seventh Circuit filed by the
State of Illinois.**

March 20, 1972

**Petition for a writ of certiorari to the United States
Court of Appeals for the Seventh Circuit granted.**

**(b) PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Persons In State Custody**

UNITED STATES OF AMERICA

vs.

DONALD SOMERVILLE, No. 64649
Full Name and Prison Number (if any) of Petitioner

vs.

STATE OF ILLINOIS

Name of Respondent

JUDGE DECKER
Case No. 69 C 614
(To be Supplied by the Clerk of the District Court)

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear which question any such continued answer refers to.

Since every petition for habeas corpus must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner

will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the original and one copy shall be mailed to the Clerk of the District Court for the Northern District of Illinois.

[7] 1. Place of detention: Illinois State Penitentiary, Stateville (Joliet) Illinois.

2. Name and location of court which imposed sentence: Circuit Court of Cook County, Illinois, Criminal Division, 26th Street and California Avenue, Chicago, Illinois.

3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:

(a) 65-3017 (Knowingly obtaining unauthorized control over stolen property).

(b)

(c)

4. The date upon which sentence was imposed and the terms of the sentence:

(a) Not less than 2 years or more than 10 years.

(b)

(c)

5. Check whether a finding of guilty was made

(a) after a plea of guilty

(b) After a plea of not guilty X

(c) after a plea of nolo contendre

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury X

(b) a judge without a jury

7. Did you appeal from the judgment of conviction or the imposition of sentence? yes

8. If you answer "yes" to (7), list

(a) the name of each court to which you appealed:

- [8] i. Appellate Court of Illinois, First District.
- ii. Supreme Court of Illinois (Petition for Leave to Appeal).
- iii. Supreme Court of the United States (Petition for Writ of Certiorari).

(b) the result in each such court to which you appealed:

- i. Affirmed.
- ii. Denied.
- iii. Denied.

(c) the date of each such result:

- i. October 16, 1967.
- ii. January 17, 1968.
- iii. October 14, 1968.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. 88 Ill. App. 2d 212, 232, N. E. 2d 115.
- ii.
- iii. 89 S. Ct. 81 (Oct. 14, 1968).

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a)
- (b)
- (c)

[9] 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Petitioner was twice placed in jeopardy for the same offense in contravention of his rights arising from the Fifth Amendment of the Constitution of

the United States made applicable to the States through the Fourteenth Amendment to the Constitution of the United States.

(b)

(c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Your petitioner was originally indicted on March 19, 1964 in case no. 64-916. On November 1, 1965, a jury was impanelled and sworn and jury trial was commenced on this indictment. On November 2, 1965 the State's Attorney moved for a mistrial because, in his opinion, the indictment did not allege an offense. Over objections of the defense a mistrial was granted. At no time prior to this action had the defense attacked the validity or sufficiency of the indictment or the allegations therein contained. On November 3, 1965, your petitioner was again indicted in Case No. 65-3017 for the same offense. Petitioner moved to dismiss the indictment on the grounds that the prosecution and trial commenced in connection with indictment No. 64-916, constituted a bar to prosecution on the subsequent indictment.

This motion of petitioner was denied.

[10] (b)

(c)

12. Prior to this petition have you filed with respect to this conviction:

(a) any petition in a state court under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, sec. 1221 No. (The issue raised herein having been presented to and decided and rejected by the Illinois courts).

(b) any petitions in a state court by way of statutory coram nobis. Ill. Rev. Stat. ch. 110, sec. 721 No.

(e) any petitions in state or federal courts for habeas corpus? No.

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(e) any other petitions, motions or applications in this or any other court? No.

* * *

[12] 14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. Petition was twice placed in jeopardy for the same offense in contravention of his rights arising from the Fifth Amendment of the Constitution of the United States made applicable to the States through the Fourteenth Amendment to the Constitution of the United States.

ii.

iii.

(b) the proceedings in which each ground was raised:

i. Petition for a Writ of Certiorari filed in the United States Supreme Court.

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) None

(b)

(c)

[13] 17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petition, motions or applications with respect to this conviction which you filed?

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Lawrence Lazar, 33 No. La Salle Street, Chicago, Illinois.

ii. Julius Lucius Echeles, 30 No. La Salle St., Chicago, Ill.

iii. Bellows, Bellows & Magidson, 10 So. La Salle St., Chicago, Ill.

iv. Charles A. Bellows, Jason E. Bellows and Sherman C. Magidson, 10 S. La Salle St., Chicago, Ill.

(b) the proceedings at which each such attorney represented you:

i. Trial.

ii. Appellate Court of Illinois (appeal).

iii. Illinois Supreme Court (Petition for leave to appeal).

iv. The Supreme Court of the United States (Writ of certiorari).

[14] 19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, Page 1 of this form)? Not applicable.

DONALD SOMERVILLE, No. 64649
Petitioner

by /s/ MARTIN GERBER
His Attorney

STATE OF ILLINOIS)

) SS.

COUNTY OF COOK)

MARTIN S. GERBER, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Martin S. Gerber
Martin S. Gerber
Attorney for Petitioner
39 South La Salle Street
Andover 3-6051
Chicago, Illinois 60603

SUBSCRIBED AND SWORN to
before me this 20th day of
March, 1969.

/s/ Esther V. Gutenberg
Notary Public

my commission expires
May 4th, 1972

[17]

(CAPTION OMITTED)

(Order of April 14, 1969:)

Under 28 U.S.C. § 2243, a writ of habeas corpus shall be answered "within three days unless for good cause additional time . . . is allowed." Since petitioner's request was filed on March 21, 1969, respondent shall have until April 14, 1969 to answer.

[18]

(CAPTION OMITTED)

RETURN TO RULE TO SHOW CAUSE

Now come the PEOPLE OF THE STATE OF ILLINOIS, respondent herein, by their attorney WILLIAM J. SCOTT, Attorney General of the State of Illinois, and for their return to the rule to show cause why a writ of habeas corpus should not issue states as follows:

1. The true cause of petitioner's incarceration in the Illinois State Penitentiary is a lawful conviction in the Circuit Court of Cook County, Illinois for the crime of theft, Ill. Rev. Stats., Ch. 38, § 16-1, exceeding \$150.00 in value. After a finding of guilty made by a jury, petitioner was sentenced to a penitentiary term of not less than 2 years nor more than 10 years.

2. There is no dispute about the facts which give rise to the petitioner's claim of double jeopardy. The petitioner was originally charged with a violation of Ill. Rev. Stats. Ch. 38, 16-1 (d), (the receiving of stolen property, subsection of the Illinois theft statute). The indictment did not allege an intent to permanently deprive the owner of possession and therefore did not charge an offense under Illinois law. People v. Harris, 394 Ill. 325, 327, 68 N.E. 2d 728 (1946); People v. Somerville, 88 Ill. App. 2d 212, 232 N.E. 2d 115 (1967).

After a jury was empaneled, but before any evidence was heard, the trial court, on the motion of the state, over a token objection by defense counsel, dismissed the indictment since it was fatally defective.

Petitioner was then properly indicted. He made the same double jeopardy argument in the Illinois trial court as he now makes in this court. The argument was rejected and petitioner was tried, convicted, and sentenced.

Petitioner renewed his argument in the Illinois Appellate Court and it was rejected. People v. Somerville, 88 Ill. App. 2d 212, 232 N. E. 2d 115 (1967). The Supreme Court of Illinois denied a petition for leave to appeal and the United States Supreme Court denied a petition for certiorari, 393 U. S. 823 (1968). Both petitions renewed the claim of double jeopardy.

* * *

[36]

(CAPTION OMITTED)

MEMORANDUM OPINION

Charging statutory theft, petitioner's original indictment failed to allege that he intended permanently to deprive the owner of possession of the stolen property. After a jury was empaneled but before any evidence was heard, the trial court dismissed the indictment at the prosecutor's request. Reindicted for the same offense, petitioner was subsequently convicted and sentenced to the penitentiary. The instant habeas corpus suit asserts that petitioner was subject to double jeopardy, in violation of the state and federal constitutions.

Denying petitioner's direct appeal, the Illinois Appellate Court correctly held that, under state law, petitioner was not initially placed in jeopardy because the indictment

did not state an offense. *People v. Somerville*, 88 Ill. App. [27] 2d 212 (1967). A theft complaint is fatally defective if it fails to allege an intent to deprive or to defraud. Compare *People v. Greene*, 92 Ill. App. 2d 201 (1968); *People v. Billingsley*, 67 Ill. App. 2d 292 (1966).

Similarly, petitioner's federal claim lacks merit because the double jeopardy clause of the Fifth Amendment does not apply to the states through the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319 (1937); compare *Benton v. Maryland*, No. 201, O.T. (1968). Furthermore, even under the United States Constitution, the original indictment did not subject petitioner to jeopardy. Except in exceptional circumstances, *United States v. Ball*, 163 U.S. 662 (1896); jeopardy does not attach to a defective indictment because the court lacks jurisdiction. Any verdict would thus be a nullity. See, e.g., *Johnsen v. United States*, 41 F. 2d 44 (9th Cir. 1930); *Haugen v. United States*, 153 F. 2d 830 (9th Cir. 1946). See also *United States v. Ewell*, 383 U.S. 116, 124 (1966). Moreover, the plea of former jeopardy is not available because the earlier dismissal was not on the merits. See *Lopez v. United States*, 17 F. 2d 462 (1st Cir. 1926); compare *Head v. Hunter*, 141 F. 2d 449 (10th Cir. 1944).¹

Accordingly, I have entered an order today dismissing the complaint for failure to state a cause of action.

ENTER:

BERNARD M. DECKER,
United States District Judge.

DATED: April 16, 1969.

1. In fact, when "manifest necessity" requires the premature termination of a trial, the defendant remains subject to subsequent prosecution even if the prosecutor's conduct may have contributed to the dismissal. See *Gori v. United States*, 367 U.S. 364 (1961); compare *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

[11] PETITION FOR LEAVE TO FILE REPLY AND
BRIEF IN RESPONSE TO THE ARGUMENT AND
BRIEF FILED BY STATE OF ILLINOIS PURSUANT
TO RULE TO SHOW CAUSE

TO:

THE HONORABLE BERNARD M. DECKER,
JUDGE OF SAID COURT:

Petitioner, Donald Somerville, by his attorney, Martin S. Gerber, moves the court for an order granting leave to file, on or before May 9, 1969, a brief in response to the answer and supporting memoranda of the Attorney General of the State of Illinois to the rule, heretofore entered on April 4, 1969, to show cause why the Writ of Habeas Corpus filed by your petitioner should not issue. In support of this motion, petitioner represents as follows:

- (1) The petitioner's petition for the issuance of a Writ of Habeas Corpus, was filed on March 21, 1969.
- [32] (2) On April 4, 1969, the court entered an order upon the State of Illinois to show cause why the said writ should not issue.
- (3) On, to-wit, April 11, 1969, the State of Illinois filed with this court its answer and supporting memorandum to the above mentioned rule to show cause.
- (4) Said answer of the State of Illinois cites to the court many cases suggesting the applicability and relevancy of said cases to the issues raised by the petitioner for the Writ of Habeas Corpus herein.
- (5) This petitioner would like an opportunity to file with this court a detailed brief addressed to the issues raised in the petition for Writ of Habeas Corpus, with

particular emphasis upon a direct response to the memoranda of law and arguments urged by the State of Illinois in its answer aforementioned.

(6) Your petitioner therefore respectfully requests that the court grant to him twenty (20) days in which to file his said brief, the same period heretofore afforded by the court to the State of Illinois to file its answer.

(SUBSCRIPT OMITTED)

[34] Order of April 17, 1969:

"Petitioner given leave to file Reply and Brief in response to argument and brief filed by State of Illinois in 10 days.

Motion of Petitioner to vacate order of dismissal continued generally."

[35] (CAPTION OMITTED)

**BRIEF IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS
STATEMENT OF FACTS**

Petitioner and a co-defendant were originally indicted by the Cook County Grand Jury in March, 1964 for receiving stolen property on March 24, 1963. On November 1, 1965, the case was called for trial and a jury was selected and sworn. The following day the State moved to nolle prosse the indictment, urging to the court an argument that the indictment did not allege that defendants intended to deprive the owner permanently of the use of the property allegedly stolen. The indictment was at no time attacked by defendants as defective. Without the consent and over objection of defendants, the jury already selected and sworn, was discharged and the indictment was dismissed.

On November 3, 1965, a second indictment was returned alleging the same crime but including additional language charging defendants intended to deprive the owner permanently of the use of the property. Petitioner moved [36] to dismiss this indictment on the grounds that he had already been placed in jeopardy for the alleged offense when the first jury had been selected and sworn. Defendant's motion was denied.

A jury was again selected and sworn. Following trial, the second jury returned a verdict of guilty and, upon a judgment of guilty, petitioner was sentenced to a term of ten years in the penitentiary.

Defendant's conviction was affirmed by the Illinois Appellate Court and his Petitions for Leave to Appeal to the Illinois Supreme Court and for a Writ of certiorari were each and both denied.

* * *

[51] Order of April 30, 1969:

"Downum v. United States, 372 U. S. 734 (1963), decided that jeopardy attaches when, a jury having been impaneled, the prosecution is unprepared to present its evidence. The defendant, in that case, was prepared to go to trial under a valid indictment. In contrast, the instant case involves a defective indictment. Petitioner's motion to vacate is therefore denied. For the reasons expressed in the April 16, 1969, memorandum opinion the cause remains dismissed."

[52] (CAPTION OMITTED)

NOTICE OF APPEAL

Notice is hereby given that the petitioner, Donald Somerville, will and hereby does, appeal from the order of April 16, 1969, dismissing the complaint for failure to state a cause of action, and from the order of April 30, 1969, denying petitioner's Motion to Vacate its order of Dismissal.

(SUBSCRIPT OMITTED)

**OPINION OF THE COURT OF APPEALS—
MAY 14, 1970**

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

September Term, 1969—April Session, 1970

No. 17817

**UNITED STATES OF AMERICA,
ex rel DONALD SOMMERVILLE,
Petitioner-Appellant,**
v.
**STATE OF ILLINOIS,
Defendant-Appellee.**

Appeal from the
United States
District Court
for the North-
ern District of
Illinois, Eastern
Division.

May 14, 1970

Before MAJOR and CASTLE, *Senior Circuit Judges*,
and FAIRCHILD, *Circuit Judge*.

CASTLE, Senior Circuit Judge. Donald Sommerville, petitioner-appellant, prosecutes this appeal from the District Court's Dismissal of his petition for habeas corpus which asserted, in substance, that he was being held in custody unlawfully pursuant to a sentence imposed following his state-court conviction in a trial which subjected him to double jeopardy in violation of the Fifth Amendment. The District Court dismissed the petition for failure to state a claim upon which relief could be granted. We affirm.

(CERTIFIED TRUE COPY)

In November 1965, following a trial in the Circuit Court of Cook County, Illinois, petitioner was convicted by a jury under a November 3, 1965, indictment charging theft¹ and was sentenced to the penitentiary for not less than two nor more than ten years. Upon his arraignment on this indictment the petitioner had filed a motion to dismiss the indictment on the grounds that he had previously been indicted on March 19, 1964, for the same offense, a jury impaneled and sworn on November 1, 1965, to try the issues, and on November 2, 1965, a motion of the State to nolle prosse was sustained over the objections of petitioner. The March 19, 1964, indictment did not allege intent to permanently deprive the owner of the use or benefit of the property,² and the State's motion for a mistrial and to nolle prosse was grounded on the assertion that this indictment did not allege an offense and was therefore void. Petitioner's motion to dismiss the second indictment and for discharge was denied. His trial proceeded and resulted in the conviction assailed in the District Court habeas corpus proceeding on the basis of double jeopardy.³

-
1. Knowingly obtaining unauthorized control over stolen property, etc. as defined by Ill. Rev. Stat. 1963, ch. 38, §16.1(d).
 2. Intent to so deprive the owner of the property is an essential element of the statutory offense sought to be charged, and its omission invalidated the indictment. *People v. Edge*, 406 Ill. 490, 493, 94 N.E. 2d 359; *People v. Harris*, 394 Ill. 325, 68 N.E. 2d 728.
 3. Petitioner's conviction was earlier affirmed on appeal which rejected his claim of double jeopardy. *People v. Sommerville*, 88 Ill. App. 2d 212, leave-to-appeal denied 37 Ill. 2d 627, cert. den. 393 U.S. 823.

At the outset we recognize that petitioner's claim of double jeopardy is to be tested by the application of federal standards. *Benton v. Maryland*, 395 U.S. 784; *Ashe v. Swenson*, . . . U.S. . . . (No. 57, October Term, 1969, April 6, 1970); *Walter v. Florida*, . . . U.S. . . . (No. 24, October Term, 1969, April 6, 1970).*

Petitioner emphasizes that he did not attack the validity of the earlier March 19, 1964, indictment nor consent to its dismissal but, on the contrary, objected to the prosecutor's motion for a mistrial and to nolle prosse. He contends that he thus avoided any bar to his subsequent assertion of double jeopardy which might be based on any doctrine of consent, waiver or estoppel. And, petitioner argues that *Downum v. United States*, 372 U.S. 734, stands for the proposition that once the jury had been selected and sworn to try him on the March 19, 1964, indictment jeopardy attached so as to bar the prosecution under the subsequent indictment, and that *United States v. Ball*, 163 U.S. 662, compels the conclusion that this is so notwithstanding the invalidity of the earlier indictment.

In *Downum*, on the morning the case was called for trial both sides announced ready. A jury was selected, sworn, and instructed to return at 2 p.m. When it returned, the prosecution asked that the jury be discharged because its key witness on two counts of the indictment was not present—a fact discovered by the prosecutor only dur-

4. The State does not question the retroactivity of *Benton* as applied to the circumstances of the instant case. This appears to be in accord with *Ashe*, *supra*, at . . ., n. 1, although the scope of *Benton's* retroactivity has not been resolved. See *Waller*, *supra*, at . . ., n. 2.

ing the noon recess. The witness had not been served with a summons, and no other arrangements had been made to assure his presence. The jury was discharged. In sustaining the claim of double jeopardy as to a retrial commenced two days later, the Supreme Court, while recognizing the valuable right of the defendant to proceed to trial before the jury he has participated in selecting, cautioned that at times this "valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him may be subordinated to the public interest—when there is an imperious necessity to do so." In this connection reference was made to *Keerl v. Montana*, 213 U.S. 135 (a "hung jury"); *Wade v. Hunter*, 336 U.S. 684 (tactical problems confronting an army in the field justifying withdrawal of a court-martial proceeding and commencement of another one on a later date); and *Simmons v. United States*, 142 U.S. 148 (likely existence of juror bias). Thus *Downum* explicitly teaches that it does not establish as absolute right in a defendant to have his trial completed by the jury selected and sworn for that purpose which in all circumstances bars discharge of that jury without his consent and a subsequent trial for the same offense.

In *United States v. Ball*, 163 U.S. 662, Ball was indicted, together with two other men, for the murder of one William T. Box. He was acquitted and his codefendants were convicted. They appealed and won a reversal on the ground that the indictment erroneously failed to aver the time or place of Box's death. All three defendants were retried and this time Ball was convicted. The Supreme Court sustained his double jeopardy claim, notwithstanding the invalidity of the original indictment on which he was acquitted. The precise holding as to Ball is succinctly stated (163 U.S. 662, 671) as follows:

"As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense."

The "acquittal" appears to have been the operative factor dictating the result in *Ball*, not the mere circumstance that a jury had been impaneled and sworn. This is further evidenced by the observation made in *Ball* (p. 669) that:

"After the full consideration which the importance of the question demands . . . and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."

And, it was the "acquittal" which was relied upon in *Benton v. Maryland*, 395 U.S. 784, in support of the holding that *Benton* was "totally indistinguishable" from *Ball*. In reference to *Ball* it is said (395 U.S. 784, 797), "[t]he Court refused to allow the Government to allege its own error to deprive the defendant [Ball] of the benefit of an acquittal by a jury", after which the Court went on to say:

"This case is totally indistinguishable. Petitioner was acquitted of larceny. He has, under *Green*, [*Green v. United States*, 355 U.S. 184] a valid double jeopardy plea which he cannot be forced to waive. Yet, Maryland wants the earlier acquittal set aside, over peti-

titioner's objections, because of a defect in the indictment. This it cannot do. Petitioner's larceny conviction cannot stand."

We perceive no proper basis for isolating the impaneling and swearing of the jury as constituting the conceptual charisma which at that point, and notwithstanding invalidity of the indictment, always serves to establish that jeopardy which, absent the defendant's consent, bars a subsequent trial for the same offense. We believe our conclusion in this respect is reinforced by the admonition in *United States v. Tateo*, 377 U.S. 463, 466, that:

"While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle [that part of the holding in *United States v. Ball*, 163 U.S. 662, which permitted retrial of the two defendants who had obtained reversal of their convictions because of invalidity of the indictment] are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the social interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided."

In the instant appeal petitioner's conviction, unlike Ball's, did not follow a previous acquittal of the same offense, and we are of the opinion that the rationale of the pertinent and governing decisions do not warrant a conclusion that the mere impanelling and swearing of the jury under the invalid indictment precluded discharge of that jury except under a bar of double jeopardy which put him irrevocably beyond the reach of further prosecution for the offense under a valid indictment.

The judgment order of the District Court dismissing the petitioner's habeas corpus action is affirmed.

Affirmed.

MAJOR, Senior Circuit Judge, dissenting. In my judgment, the decision in *Downum v. United States*, 372 U.S. 734, that jeopardy attached at the time the jury was impaneled under facts as similar to those in the instant case as two peas in the same pod, is controlling. Both cases were dismissed on motion of the Government because of its own fault. In *Downum*, it was the failure of the Government to procure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which it was responsible.

The quotation from *Downum* in the majority opinion is not complete. In that case the court further stated (page 736):

"Harrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori v. United States, supra*, 369. But those extreme cases do not mark the limits of the guarantee. The discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and strik-

ing circumstances,' to use the words of Mr. Justice Story in *United States v. Coolidge*, 25 Fed. Cas. 622, 623. For the prohibition of the Double Jeopardy Clause is 'not against being twice punished, but against being twice put in jeopardy.' *United States v. Ball*, 163 U.S. 662, 669."

The proclamation in Downum cannot be swept aside because the court recognized and referred to some cases where defendant's right to have his trial completed was subordinated to the public interest—when there is "an imperious necessity to do so" or in "very extraordinary and striking circumstances." These so-called exceptions were of no avail to the Government in Downum, nor are they in the instant case.

The decision in Downum as to when jeopardy attaches, given the facts of that case, has never been overruled or criticized by any court of which I am aware. In fact, it has often been recognized as the prevailing rule.

There are, of course, cases where the courts have refused to apply the rule of Downum, because of different factual situations. Usually such cases distinguish Downum on the basis that a judgment of conviction was vacated, reversed on appeal or the indictment dismissed on motion of the defendant. Even these cases, however, recognize the vitality of Downum where the dismissal is made on motion by the Government. Typical of such cases is *United States v. Tateo*, 377 U.S. 463, where a judgment of conviction was set aside as a result of a collateral attack by the defendant. The court held that defendant could not rely on double jeopardy, and in doing so stated (page 467):

"*Downum v. United States*, 327 U.S. 734, is in no way inconsistent with permitting a retrial here. There the Court held that when a jury is discharged because the prosecution is not ready to go forward with its case,

the accused may not then be tried before another jury."

A case much in point which vividly illustrates the distinction between cases where a dismissal is procured on motion of the Government and those where it is procured on motion of the defendant is the recent decision of this court in *United States v. Franke*, 409 F. 2d 958, where we denied defendant's plea of double jeopardy on the ground that the case relied upon as constituting jeopardy was dismissed on defendant's motion. In doing so we recognized Downum but distinguished it on the facts. We reasoned (page 959) :

"We think that since the original indictment was dismissed *on defendant's motion* the denial of the double jeopardy motion was proper. See *United States v. Ewell*, 383 U.S. 116, 124-125, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), where defendant's convictions were set aside on their own motion and the Double Jeopardy Clause was found not to bar retrial for the same offense. See also *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964), where the Court held the Double Jeopardy Clause not violated by retrial of the same alleged crimes after Tateo's conviction on a plea of guilty had been set aside *on his motion*. It is enough for us to say that here defendant's motions caused dismissal of the indictment — even though the order of dismissal came after the selection of jury — and retrial under corrected indictment is not precluded by the Double Jeopardy Clause. If, after convictions are overturned at instance of defendants, retrials are not barred by the Double Jeopardy Clause, *a fortiori*, defendant's trial under the corrected indictment here is not barred." (Italics supplied.)

As to Downum we stated (page 959) :

"In Downum the jury was discharged because the prosecution was not ready to proceed. Pleas of former

jeopardy were denied and the Supreme Court reversed. The Supreme Court in *Tateo* said that *Downum* was not inconsistent with the *Tateo* rule. 377 U.S. at 467, 84 S. Ct. 1587. Since we follow *Tateo* it follows that our decision is not inconsistent with *Downum*. *Ipsa facto* our decision here is not inconsistent with *Cornero v. United States*, 48 F. 2d 69, 74 A.L.R. (9th Cir. 1931), a case involving facts similar to *Downum*, and which was approved in *Downum*, 372 U.S. at 737, 83 S. Ct. 1033."

The Supreme Court in *Downum* quoted from *Cornero* (page 737):

"The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses."

Ball v. United States, 163 U.S. 662, is wholly irrelevant to the issue as to whether jeopardy attached at the time the jury was impaneled as no such issue was before the court. The sole pertinency of *Ball* to the situation before us is that it completely refutes the State's argument that the defendant was not in jeopardy because the indictment, allegedly defective, stated no offense and a judgment entered thereon would have been void. In *Ball*, the court held (page 670):

"But, although the indictment was fatally defective, yet, if the court had jurisdiction of the case and of the party, its judgment is not void, but only voidable by writ of error, and until so avoided cannot be collaterally impeached." (Quoted with approval in *Benton v. Maryland*, 395 U.S. 784, 797.)

In the instant matter the court had jurisdiction of the case and the parties, and a judgment rendered after trial would have been voidable, not void.

The majority opinion places much stress on Ball, supposedly for the purpose of showing that jeopardy did not attach when the jury was impaneled. In my view, for reasons previously stated, such reasoning is not sound. If it has any merit, it is strange that the Supreme Court when it decided Downum April 22, 1963, and determined that jeopardy attached when the jury was impaneled, was unaware of its previous decision in Ball.

In my view, the decision in Downum requires a reversal of the order appealed from.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

ORDER OF AFFIRMANCE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, May 14, 1970

Before

Hon. J. Earl Major, Senior Circuit Judge

Hon. Latham Castle, Senior Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

No. 17817

UNITED STATES OF AMERICA,

ex rel.,

DONALD SOMMERVILLE,

Petitioner-Appellant,

vs.

STATE OF ILLINOIS,

Defendant-Appellee.

Appeal from the
United States
District Court
for the Northern
District of
Illinois,
Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court dismissing the petitioner's habeas corpus action be, and the same is hereby, **AFFIRMED**, with costs, in accordance with the opinion of this Court filed this day.

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Wednesday, August 19, 1970

Before

Hon. Latham Castle, Sr. Circuit Judge

Hon. J. Earl Major, Sr. Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

UNITED STATES OF AMERICA,

ex rel.,

DONALD SOMMERSVILLE,

Petitioner-Appellant,

vs.

No. 17817

STATE OF ILLINOIS,

Respondent-Appellee.

Appeal from the
United States
District Court
for the Northern
District of
Illinois,
Eastern Division

On consideration of the petition of petitioner-appellant, United States of America, *ex rel* Donald Sommerville, for a rehearing by the Court *en banc* in the above entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the petitioner-appellant for a rehearing in the above entitled appeal be, and the same is hereby denied.

ORDER OF SUPREME COURT REVERSING
AND REMANDING
SUPREME COURT OF THE UNITED STATES
No. 976, October Term, 1970
DONALD SOMMERSVILLE, Petitioner

v.

ILLINOIS

On Petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States v. Jorn*, 401 U.S.—, decided January 25, 1971; and *Downum v. United States*, 372 U.S. (1963). Mr. Justice Douglas is of the opinion that the petition should be granted and the judgment of the United States Court of Appeals for the Seventh Circuit reversed. *United States v. Jorn*, 401 U.S.—, decided January 25, 1971.

April 5, 1971

OPINION OF THE COURT OF APPEALS—

JULY 20, 1971

SEPTEMBER TERM, 1970, APRIL SESSION, 1971

No. 17817

UNITED STATES OF AMERICA,
ex rel. DONALD SOMERVILLE,
Petitioner-Appellant,
v.

STATE OF ILLINOIS,
Respondent-Appellee.

On Remand from
the Supreme
Court of the
United States.

July 20, 1971

Before MAJOR and CASTLE, *Senior Circuit Judges*,
and FAIRCHILD, *Circuit Judge*.

MAJOR, *Senior Circuit Judge*. This case had its genesis by way of a petition for habeas corpus filed in the district court by Donald Somerville, which asserted that he was being held in custody unlawfully pursuant to a sentence imposed in a trial which subjected him to double jeopardy, in violation of the Fifth Amendment. It was alleged that Somerville had been placed in jeopardy by reason of a previous state court charge which was dismissed on motion of the government, after a jury had been impaneled and sworn to try the case. The district court dismissed the petition for failure to state a claim upon which relief could be granted. From such dismissal Somerville appealed to this court.

The principal issue involved the interpretation and effect to be given *Downum v. United States*, 372 U.S. 734. This court, with one judge dissenting, in an opinion rendered May 14, 1970, held that *Downum* was not applicable and

affirmed the district court's order of dismissal. *U.S. ex rel. Somerville v. State of Illinois*, 429 F. 2d 1335.

On January 25, 1971, the Supreme Court decided *United States v. Jorn*, 400 U.S. 470. On Somerville's petition for writ of certiorari, that court on April 5, 1971 entered an order which in material part provided:

"The petition for a writ of certiorari is granted, the judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States v. Jorn*, 400 U.S. 470, decided January 25, 1971; and *Downum v. United States*, 372 U.S. 734 (1963)."

After receipt of the mandate, we requested counsel for the respective parties to submit briefs in support of their contentions relative to *Downum* and *Jorn*. This has been done, and this court, with one judge dissenting, now holds that those decisions require that the order of the district court be reversed and Somerville discharged.

We think it not necessary to reiterate the factual situation or the reasoning employed in our previous majority and dissenting opinions. One factor, however, which appears to have been strongly relied upon by the majority is that Somerville was not in jeopardy because he was not tried and acquitted. *United States v. Ball*, 163 U.S. 662, and *Benton v. Maryland*, 395 U.S. 784, are cited in support of this reasoning. The fact that jeopardy attached in those cases at the time the defendants were tried and acquitted furnishes no support for the premise that jeopardy in the instant case did not attach at the time the jury was impaneled and sworn to try the case. Any doubt on this score has been removed by the Supreme Court.

In *Green v. United States*, 355 U.S. 184, 188, the court stated:

"Moreover, it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."

In *Jorn*, the court recognised this principle (page 480) :

"Thus the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings."

We doubt the necessity, much less the pertinency, of attempting to discuss *Jorn* in detail. Generally, the cases dealing with double jeopardy fall into two categories, (1) where a mistrial is declared without any affirmative action on the part of the defendant, or (2) where a mistrial is declared on defendant's motion or a conviction reversed on his appeal. *Downum*, *Jorn* and the instant case fall squarely in the first category. In *Downum*, it was the failure of the government to secure the attendance of a material witness; in the instant case, it was an allegedly defective indictment for which the government was responsible, and in *Jorn*, it was the trial judge who aborted the proceeding, without defendant's consent. In *Jorn*, the court (page 474) stated:

"The issue is whether appellee had been 'put in jeopardy' by virtue of the impaneling of the jury in the first proceeding before the declaration of mistrial."

After citing and discussing numerous cases where the plea of double jeopardy had been denied, all on facts we think quite dissimilar to those here, the court stated (page 484) :

"For the crucial difference between reprocsecution after appeal by the defendant and reprocsecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. *On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'* See *Wade v. Hunter*, 336 U.S. 684, 689 (1949)." (Italics supplied.)

The Supreme Court in *Jorn* apparently recognized the validity of *Downum*. It stated (page 486) :

"The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. *Downum v. United States*, 372 U.S. 734 (1963)."

Mr. Chief Justice Burger in a concurring opinion made the pertinent statement (page 488) :

"If the accused had brought about the erroneous mistrial ruling we would have a different case, but this record shows nothing to take appellee's claims outside the classic mold of being twice placed in jeopardy for the same offense."

That statement would have been as appropriate to the facts in *Downum* as it is to those of the instant case.

The State of Illinois in its brief, supposedly written as an aid to our interpretation of *Jorn*, contends that Illinois, not federal, law is controlling on the issue as to when jeopardy attaches. We see no purpose in pursuing this line of reasoning. Under the mandate of the Supreme Court the case has been remanded for reconsideration in

the light of *Jorn* and *Downum*, and not Illinois law. In our previous opinion we held that Somerville's claim of double jeopardy must be tested by the application of federal standards (page 1336). Moreover, the issue has been settled adversely to the State by *United States v. Ball*, 163 U.S. 662, and *Benton v. Maryland*, 395 U.S. 784.

We hold that in the light of *Downum* and *Jorn*, the petition for habeas corpus should have been allowed and Somerville discharged. The order appealed from is reversed and the cause remanded for that purpose.

CASTLE, *Senior Circuit Judge*, dissents for the reasons set forth in *United States of America ex rel. Donald Somerville v. State of Illinois*, 429 F. 2d 1335.

A true Copy:

Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

**ORDER OF REVERSAL
UNITED STATES COURT OF APPEALS**

For the Seventh Circuit
Chicago, Illinois 60604

JULY 20, 1971

Before

Hon. Earl Major, Senior Circuit Judge

Hon. Latham Castle, Senior Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

UNITED STATES OF AMERICA,

ex rel. DONALD SOMERVILLE,

Petitioner-Appellant,

vs.

No. 17817

STATE OF ILLINOIS,

Respondent-Appellee.

} On Remand
from the
Supreme Court
of the
United States.

There has been filed in the office of the Clerk of this Court a certified copy of the judgment of the Supreme Court of the United States, as follows:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, vacated with costs; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Seventh Circuit for reconsideration in light of *United States v. Jorn*, 401 U.S. 470, and *Downum v. United States*, 372 U.S. 734 (1963).

It is further ordered that the said petitioner, Donald Somerville, recover from the State of Illinois One

Hundred Dollars (\$100) for his costs herein expended."

Pursuant to the order of this Court supplementary briefs were filed by counsel for the parties. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in this cause appealed from be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said District Court with directions to grant the petition for habeas corpus and to order the discharge of petitioner-appellant Donald Somerville.

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Friday, September 3, 1971.

Before

Hon. Latham Castle, Senior Circuit Judge

Hon. J. Earl Major, Senior Circuit Judge

Hon. Thomas E. Fairchild, Circuit Judge

UNITED STATES OF AMERICA,
ex rel. DONALD SOMERVILLE,
Petitioner-Appellant,
vs.

No. 17817

STATE OF ILLINOIS,

Respondent-Appellee.

Appeal from the
United States
District Court
for the Northern
District of
Illinois, Eastern
Division

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a re-hearing,

IT IS ORDERED that the petition for a rehearing in the above entitled cause be and the same is hereby denied.

**ORDER GRANTING CERTIORARI
SUPREME COURT OF THE UNITED STATES**

No. 71-692

ILLINOIS, Petitioner,

v.

DONALD SOMERVILLE

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The petition for a writ of certiorari is granted.

March 20, 1972